NO. 22472

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME BYRNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

Appellant, formerly an investigator in the Alcohol and Tobacco Tax Division of the Internal Revenue Service [hereinafter referred to as ATTD], was indicted by the Federal Grand Jury for the Southern District of California on April 25, 1962, on eight counts: counts one, three, five and seven charged violations of 18 U.S.C. §872, extortion by officers or employees of the United States; counts two, four, six and eight alleged violations of 18 U.S.C. §202, soliciting money by an officer and employee of the United States for the purpose of influencing his official action. The offenses concerned attempts to extort money from one W. David Tallmadge, the subject of an ATTD investigation being

conducted by appellant.

On January 31, 1963, following a trial by jury, appellant was convicted on counts one through five and count seven of the indictment, and acquitted on counts six and eight. A sentence of eighteen months on each count was imposed, the sentences to run concurrently.

This Court affirmed the judgment of conviction in Byrnes v. United States, 327 F. 2d 825 (1964). The Supreme Court denied a petition for certiorari, 377 U.S. 970 (1964).

On February 4, 1965, appellant filed a motion for new trial based on newly discovered evidence. The "newly discovered evidence" consisted of a photostat copy of a letter purportedly written by Francis X. Gilmore, deceased supervisor of the Los Angeles office of ATTD, alleging that William G. Simon, an F. B. I. agent who testified at appellant's trial as to a conversation overheard between appellant and W. David Tallmadge, had told him at the time of appellant's arrest that no conversation was overheard. Following a formal hearing on February 15 and 19, 1965, before the Honorable E. Avery Crary, who also presided at appellant's trial, the motion for a new trial was denied. Judge Crary entered a finding that the testimony of William G. Simon was not perjurious.

The judgment denying the motion for a new trial was affirmed by this Court per curiam, 348 F. 2d 918(1965), and the Supreme Court denied certiorari, 382 U.S. 977 (1965).

Appellant commenced service of the sentence on June 22,

1964. Sentence has been fully served.

On August 23, 1967, appellant filed a Motion to Vacate, Set Aside and Void Illegal Sentence [C. T. 2]. 1/ Appellee responded with a Motion to Dismiss, filed September 15, 1967 [C. T. 28]. The motion to dismiss was heard by Judge Crary on October 2, 23 and 24, 1967, and granted in a memorandum opinion and order entered November 6, 1967 [C. T. 72]. This appeal then followed.

Jurisdiction of the court below was asserted on the basis of the "All Writs Statute", 28 U. S. C. §1651(a). The appellee contends that the court below lacked jurisdiction, as does this Court, because the questions presented are moot.

II

STATUTES INVOLVED

Section 1651(a) of Title 28, United States Code provides as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

1/ "C. T." refers to Clerk's Transcript.

III

STATEMENT OF FACTS

A. Facts Leading to Appellant's Conviction. 2/

In February, 1962, appellant was assigned by the Los Angeles Alcohol Tobacco Tax Division Office to investigate possible violations of the Federal Firearms Act by W. David Tallmadge. In the course of this investigation, appellant attempted to obtain $25,000 from Tallmadge in return for arranging to have the investigation disposed of without criminal prosecution. Threats were made that Tallmadge and his family would be in serious physical jeopardy if Tallmadge did not cooperate.

Appellant's first attempt to extort funds from Tallmadge occurred during an interview in Tallmadge's office on March 7, 1962, when appellant suggested that Tallmadge offer $10,000 or more to a United States Attorney in order to halt the investigation. As soon as appellant left, Tallmadge called his attorney in Chicago, who in turn contacted the Chicago Alcohol Tobacco Tax Division office. Shortly thereafter, agents of the Los Angeles Alcohol Tobacco Tax Division office were sent to interview Tallmadge. As a result of this interview, the F. B. I. was called into the case.

After further contacts with Tallmadge on March 8 and 11,

2/ This statement of facts is adopted from that set forth in Appellee's Brief in Case No. 19,997 in this Court, the appeal from Appellant's Motion for New Trial.

1962, appellant appeared by previous arrangement at Tallmadge's office at 9:00 a.m. on March 12, where he was to collect the $25,000. Several F.B.I. agents, including William G. Simon, Special Agent in Charge of the Los Angeles Office, were hiding in Tallmadge's office. Tallmadge told appellant that he had not been able to obtain the money, whereupon appellant led Tallmadge to the bathroom. Appellant stepped in first, put on the light and water faucet and then motioned Tallmadge inside. After Tallmadge entered, appellant closed the door and a conversation ensued. Special Agent Simon went to the bathroom door, and overheard parts of this conversation, including Tallmadge's statement, "I'll get the money," and appellant saying, "Do you know what a strain this is, going through something like this. You promised me you would have it." Simon then opened the door and placed the appellant under arrest.

B. Facts Surrounding Appellant's Motion for New Trial. 3/

On June 12, 1964, appellant's court-appointed trial counsel received an anonymous envelope in the mail, bearing a San Francisco postmark dated June 11, 1964. The envelope bore no return address, nor any indication of the sender's identity. Inside was a photostated copy of a document purporting to be a

3/ This statement of facts is also adopted from the Appellee's Brief in Case No. 19,997 in this Court, the appeal from Appellant's Motion for New Trial.

letter signed by Francis X. Gilmore, former supervisor of the Los Angeles Alcohol Tobacco Tax Division office who was then deceased. The addressee of the letter had been obliterated. This letter stated in part:

> "Immediately after arresting Byrnes, Simon privately informed me no money had changed hands or was involved. I specifically asked him if there were any witnesses, and he told me Byrnes and Tallmadge had been in a lavatory near Tallmadge's office, and he had put his ear to the door but could not make out what was being said as the voices were garbled."

On the basis of this letter, appellant filed a motion for new trial based upon newly discovered evidence. An investigation was undertaken by the F. B. I. to determine the authenticity of the letter. The matter was heard by Judge Crary on February 15 and 19, 1965. At the hearing, the letter was rejected as evidence. No evidence that Mr. Gilmore had ever prepared, delivered or mailed such a letter was produced. After hearing the testimony of several witnesses, including William G. Simon, the court denied the motion, stating "I don't conclude and I do not believe that Mr. Simon perjured himself."

C. Facts Surrounding Appellant's Motion to Vacate.

On August 23, 1967, appellant filed a Motion to Vacate, Set Aside and Void his sentence, claiming a denial of his constitutional right to a fair trial on the ground that Norman T. Ollestad, an Assistant United States Attorney at the time of his trial, had knowledge that Simon's testimony was perjurious, but failed to disclose it to the trial court [C.T. 2]. Attached to the motion as "Exhibit A" was an unsigned document entitled "An Open Apology" [C.T. 11], as well as an excerpt from the book, "Inside the F.B.I.", written by Norman T. Ollestad [C.T. 12-22], both of which appellant claimed to have received in the mail from an anonymous benefactor. Also accompanying the motion was a request for subpoenas duces tecum to be issued for Norman T. Ollestad, as well as two television commentators on whose programs Ollestad had allegedly appeared [C.T. 23].

The respondent moved to dismiss the appellant's motion [C.T. 28], and at the initial hearing of this motion on October 2, 1967, Judge Crary continued the matter three weeks, in order to allow the appellant to either produce an affidavit from Norman T. Ollestad, or to file his own affidavit stating why he was unable to secure an affidavit from Mr. Ollestad [R.T. 21-26]. 4/

On October 16, 1967, appellant filed an affidavit stating he

4/ "R.T." refers to the Reporter's Transcript of Proceedings.

had contacted Mr. Ollestad who initially agreed to give him an affidavit "but stated he was afraid that he would be cut up in little pieces, disbarred and probably prosecuted." At a subsequent meeting, Mr. Ollestad's attorney declined to supply appellant with an affidavit [C. T. 54].

Judge Crary then requested that Mr. Ollestad be subpoenaed to appear as the Court's witness. He appeared on October 23, 1967 [R. T. 41]. Upon examination by the Court, Mr. Ollestad stated he had been an F. B. I. agent for a period of ten months, from November, 1960 to September, 1961 [R. T. 43], after which he served for two years as an Assistant United States Attorney for the Southern District of California [R. T. 41-42]. He began writing "Inside the F. B. I." sometime in 1964, after leaving the United States Attorney's Office. The book was completed and published in June of 1967 [R. T. 46].

Ollestad admitted that the incidents he described in pages 287 through 295 of his book were, in fact, based upon events surrounding the investigation and trial of the appellant [R. T. 50]. Certain factual changes were made "so it wouldn't cause any undue embarrassment to the principals." [R. T. 154, 159]. A few examples of the factual changes which Mr. Ollestad acknowledged were the following:

1. With the exception of the F. B. I. agent who actually testified, all agents described in the book were fictional characters [R. T. 54, 164];

2. The name of the appellant was changed to Jerry

Hernstein, appellant having been indicted under the name Jerome Bernstein as well as Jerome Byrnes [R. T. 54];

3. The amount of the money sought as a bribe was changed from $25,000 to $20,000 [R. T. 153-54];

4. The book describes a microphone being placed in the bathroom, and a conversation in which one agent says to another "Aren't you glad I thought to put the mike in there." In fact, Mr. Ollestad admitted no microphone was in the bathroom, and no such conversation ever took place [R. T. 169, 172];

5. The book describes "Hernstein" and the victim walking to the bathroom "without a word". In fact, there was a brief conversation, recorded on tape [R. T. 173-74];

6. Time intervals surrounding the Gilmore letter were changed. The book states Gilmore died a week after the appellant's conviction, whereas he actually died eleven months later [R. T. 160]. The book states the letter was received by Mr. Byrnes' attorney a few weeks after the trial, whereas it was actually received a year and a half later [R. T. 159].

With respect to the conversations attributed to the F. B. I. Agents in the book, Mr. Ollestad stated they were a distillation of accounts he had heard from disgruntled Treasury Agents, as well as F. B. I. agents complaining about the way the investigation of the case was handled [R. T. 56-57, 75-77]. He could not attribute any of these statements to any particular agents [R. T. 189-90], nor could he attribute any of the things he heard to any agents who participated in the investigation:

"Q. So, Mr. Ollestad, you yourself did not have any factual basis to attribute this statement to one of the agents investigating the case?

"A. Well, I wasn't sure of all the agents who were investigating the case and I didn't know who had made the statement.

"THE COURT: So you just put it in the mouth of somebody who had investigated the case?

"THE WITNESS: Right.

"THE COURT: Without knowing he had actually made the statement or that anybody investigating the case had made the statement?

"THE WITNESS: Yes." [R.T. 199-200].

In short, Mr. Ollestad conceded that the account of the events surrounding the investigation contained in his book merely reflected his conclusion that William Simon committed perjury, a conclusion he reached long after leaving both the F.B.I. and the United States Attorney's Office [R.T. 57, 91]. His incredible account of how he arrived at this conclusion is certainly no credit either to the training he received to become an attorney or to become an F.B.I. Agent. Mr. Ollestad stated he based his conclusion upon the statements he heard from disgruntled agents, corroboration he later found in the court files, and the Gilmore letter [R.T. 66-67].

First, he stated all of the statements and accounts he heard regarding the investigation were of the rankest hearsay

nature [R. T. 99, 115]. Not only were these statements in the nature of complaints by disgruntled agents [R. T. 56, 75], but he was unable to attribute any personal knowledge to any of the agents he spoke to [R. T. 199-200]. Mr. Ollestad could not recall ever having discussed the matter with Mr. Simon [R. T. 81] or other agents who had actually participated in the investigation [R. T. 232-35].

Secondly, the "corroboration" he later found in the court file consisted of an inconsistency between a witness' testimony and the way in which a government attorney paraphrased that testimony in a pleading filed with the court [R. T. 224]. Although the question of whether Mr. Simon's testimony was perjurious had been fully litigated in court proceedings, Mr. Ollestad's "review" of the court record did not include a reading of the transcript of those proceedings [R. T. 149], nor did it include a review of any of the exhibits presented in those proceedings [R. T. 57, 58, 62]. At no time after leaving the U. S. Attorney's Office in November, 1963 did Mr. Ollestad discuss the matter with anyone in that office or the F. B. I. [R. T. 65, 66].

Finally, Mr. Ollestad's conclusion was based upon an assumption that the "Gilmore letter" was a genuine document, written by Francis X. Gilmore [R. T. 155]. In a fascinating display of logic, Mr. Ollestad concluded that the letter must be authentic because the prior investigation which failed to determine its authenticity was, in his opinion, "cursory" [R. T. 68]. He did not recall having even read the affidavit filed on the motion for new

trial relating what investigation of the letter had been made [R. T. 227-29], and stated that he himself conducted no additional investigation of the letter's authenticity [R. T. 157].

Mr. Ollestad was questioned closely as to what official connection he had as an Assistant U. S. Attorney with either the appellant's case or the case involving W. David Tallmadge, whom appellant was investigating. He stated he had nothing to do with the investigation of the appellant's case [R. T. 44, 63, 115]. None of the conversations with agents about which he testified were in any official capacity, all having occurred after the trial of the appellant [R. T. 55-56].

According to the Affidavit of Thomas R. Sheridan, Mr. Ollestad was assigned to evaluate the Tallmadge file and make a recommendation as to prosecution subsequent to February 26, 1963 [C. T. 62]. However, Mr. Ollestad did not recall having handled the matter even when confronted by letters he had composed declining prosecution of the case [R. T. 230], and he stated that he had no specific recollection that because of his handling of the Tallmadge matter he knew anything about appellant's case [R. T. 232].

At the conclusion of Mr. Ollestad's testimony, the matter was taken under submission, with the proviso that an affidavit be filed by the government reflecting when the Tallmadge case was assigned to Ollestad and be considered a part of the evidence [R. T. 310]. An affidavit signed by Thomas R. Sheridan was filed on November 3, 1967 [C. T. 62]. On November 6, 1967, the court

entered a memorandum opinion and order granting the motion to dismiss Appellant's Motion to Vacate, Set Aside and Void the sentence [C.T. 72].

IV

SPECIFICATIONS OF ERRORS

Three questions are presented by this appeal:

A. Does this Court lack jurisdiction of this appeal because the questions presented are moot?

B. Did the Court below err in dismissing Appellant's Petition for a Writ of Error Coram Nobis?

C. Did the Court below commit reversible error in considering the affidavit of Thomas R. Sheridan?

V

ARGUMENT

A. THIS COURT LACKS JURISDICTION OF THIS APPEAL BECAUSE THE QUESTIONS PRESENTED ARE MOOT.

The appellant originally sought relief in the court below on the basis of Rule 35, Federal Rules of Criminal Procedure. The court below correctly concluded that Rule 35 was inapplicable, since "the narrow function of Rule 35 is to permit the correction at any time of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition

of sentence." Hill v. United States, 368 U.S. 424, 430 (1962); Redfield v. United States, 315 F.2d 76, 81 (9th Cir. 1963).

In the alternative, relief was sought in the form of a Writ of Error Coram Nobis. The court below concluded that petitioner presented a petition in the nature of a Writ of Error Coram Nobis [C.T. 83]. The Writ of Error Coram Nobis, however, does not eliminate the jurisdictional requirement that a case or controversy must be presented before a court has jurisdiction to act; and no case or controversy is presented where the issues one seeks to litigate are moot.

The only sentence imposed upon the defendant was imprisonment for a period of eighteen months on each count, to run concurrently. Appellant commenced service of this sentence on June 22, 1964, and the sentence has now been served in full.

If this were a direct appeal from the conviction, the appeal would be moot. St. Pierre v. United States, 319 U.S. 41 (1943); Williams v. United States, 261 F.2d 224 (9th Cir. 1958), cert. den. 358 U.S. 942. As stated by the Supreme Court in St. Pierre v. United States, supra, at p. 43: "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review."

Cf. Penneywell v. McCarrey, 255 F.2d 735 (9th Cir. 1958); Gillen v. United States, 199 F.2d 454 (9th Cir. 1952); Government of Virgin Islands v. Ferrer, 275 F.2d 497 (3rd Cir. 1922).

Clearly, a justiciable controversy must also be presented upon a petition for relief in the nature of the Writ of Error Coram

Nobis. The writ has been used to attack convictions entailing collateral legal disadvantages which survive the satisfaction of sentence, such as providing the basis for sentencing as a recidivist on a subsequent conviction, United States v. Morgan, 346 U.S. 502 (1954), or barring the exercise of voting rights, United States v. Cariola, 343 F. 2d 180 (3rd Cir. 1963), but here the appellant has alleged no such collateral disadvantages. Embarrassment and loss of prestige are "not enough to justify a judicial determination of petitioner's rights. The moral stigma of a judgment which affects no legal rights presents no case or controversy of federal cognizance." United States v. Cariola, supra, at p. 182.

B. THE COURT BELOW DID NOT ERR IN DISMISSING APPELLANT'S PETITION FOR A WRIT OF ERROR CORAM NOBIS.

The common law Writ of Error Coram Nobis was exhumed by the Supreme Court in United States v. Morgan, 346 U.S. 502 (1954). There, a state prisoner sentenced as a recidivist sought to vacate a prior federal conviction used by the state as a basis for sentencing him as a "habitual offender". Since the federal sentence had already been served, relief was not available under 28 United States Code, §2255. Moreover, since the ground alleged for invalidity of the prior conviction was denial of right to counsel, the court noted that Rule 35 was inapplicable. However, the court held that the common law Writ of Error Coram Nobis, to correct

errors in the judgment, was still available under the "all writs statute", 28 United States Code, §1651(a). In remanding for a hearing, however, the court warned:

> "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice."

Since Morgan, the courts have frequently refused resort to this extraordinary remedy, citing the absence of "compelling circumstances". E. g., Matysek v. United States, 339 F. 2d 389, 395 (9th Cir. 1964); Young v. United States, 337 F. 2d 753, 756 (5th Cir. 1964).

In dismissing appellant's petition, the court below concluded that compelling circumstances had not been shown because appellant was seeking to relitigate the question of whether Agent Simon gave false testimony at his trials, without presenting anything that would materially affect the results of that prior litigation:

> "If Ollestad had reported the information petitioner says he had relative to the alleged conspiracy, it would have been the same as that considered by the court in petitioner's motion for a new trial, to wit, the alleged perjury of F. B. I. Agent Simon in his testimony at the trials of the petitioner." [C. T. 75-76].

The appellant repeatedly asserted in the court below that he was not seeking to relitigate the issue of whether William Simon's testimony was perjurious [R. T. 13, 294]. Again, in his brief on appeal, appellant argues that the sole issue is whether there was misconduct by Assistant United States Attorney Norman T. Ollestad. But in urging that he was prejudiced by this "misconduct", as indeed he must, he alleges that if Ollestad had made his knowledge known, "Appellant's claim that William Simon had perjured himself would have been completely substantiated." (Appellant's Opening Brief, p. 15). Thus, we return to an issue that was fully litigated at the time of appellant's motion for new trial.

The only "evidence" beyond that presented on the motion for new trial which appellant now claims is that agents stated to Ollestad "that William Simon had in fact directly told them he had not overheard the conversation to which he [Simon] testified to at Appellant's trial." (Appellant's Opening Brief, p. 14). There is no basis in the record for this claim. At no time did Ollestad state that the agents he spoke to had ever even discussed the case with William Simon. Quite to the contrary, he stated he had not discussed this with any of the agents who were actually at the scene of the investigation [R. T. 82], and placed this specific statement in the context of complaints about the particular work-up of the case [R. T. 77]. With respect to appellant's claim that this information would have significantly affected the outcome of his motion for new trial, it should be noted that William Simon testified at the hearing

of appellant's motion for new trial, and was questioned at great length concerning his testimony at the trial, as well as any statements he had made to others regarding what he heard through the bathroom door. In addition, other agents who were present with Mr. Simon at the time of appellant's arrest appeared and testified.

In effect, appellant was seeking to present "newly discovered evidence" after expiration of the time limits expressed in Rule 33, under the guise of a petition for a Writ of Error Coram Nobis. Even if this extraordinary writ were available for such a purpose, the same standards used to evaluate "newly discovered evidence" presented under Rule 33 should be applied in determining if a petitioner can make "a showing so strong that action to achieve justice is compelled." [C.T. 81].

Petitioner's situation is identical to that presented to the Fifth Circuit Court of Appeals in Reid v. United States, 149 F.2d 334 (1945). There, eighteen months after his conviction, the defendant petitioned for a Writ of Error Coram Nobis, alleging that one of the government witnesses at his trial gave perjured testimony. At the time, the Federal Rules required that a motion for new trial on the grounds of newly discovered evidence be filed within sixty days of final judgment. In upholding the summary denial of the petition, the court stated:

> "This is in substance a motion for new trial for newly discovered evidence, which under Rule 2(3) for Procedure in Criminal Cases after Verdict, 18 U.S.C.A. following Section 688, must be filed within

sixty days after final judgment, the case not being a capital case. Calling this motion a petition for a writ of error coram nobis does not help it. The corrective powers of the courts touching the truth of the case are exhausted."

149 F. 2d at 335. Similarly, the Sixth Circuit Court of Appeals, in Meredith v. United States, 138 F. 2d 772 (1943), held that Coram Nobis was unavailable to attack a judgment on the ground three new witnesses were discovered to show a government witness had given perjured testimony. The court concluded:

"The petition and the record before us, do not show even claimed errors which, of themselves, would render the judgment irregular and invalid. The discovery of new witnesses to sustain proof of perjury would be properly raised before the trial court on motion for a new trial."

138 F. 2d at 773.

Even if the extraordinary Writ of Error Coram Nobis were to be made available as a substitute for a motion for new trial, the "new evidence" proffered should at least meet the standards imposed on a Rule 33 motion. Applying those standards, it is clear the court below did not err in concluding that petitioner did not make a showing so strong that action to achieve justice is compelled [C. T. 81]. These criteria are: (1) it must appear from the motion that the evidence is, in fact, newly discovered; (2) the motion must allege facts from which the court may infer diligence

on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) the evidence must be material to the issues involved, and (5) the evidence must be such that on a new trial, would probably produce an acquittal. Beyda v. United States, 324 F. 2d 526, 531 (9th Cir. 1963); Pitts v. United States, 269 F. 2d 808 (9th Cir. 1959), cert. den. 360 U.S. 919; Bulestreri v. United States, 224 F. 2d 915 (9th Cir. 1955); Brandon v. United States, 190 F. 2d 175 (9th Cir. 1951).

Certainly, if the "evidence" relied upon is clearly inadmissible, it would not qualify as "newly discovered evidence". McCroskey v. United States, 339 F. 2d 895 (8th Cir. 1965) (results of polygraph test); Saunders v. United States, 192 F. 2d 409 (D. C. Cir. 1951) (Police Department Memorandum). Here, the only "evidence" producible would be hearsay; moreover, it is merely cumulative to evidence already presented and rejected, on the motion for new trial.

In asserting that the court below disregarded "the relevant heart of the basic issue," (Appellant's Opening Brief, p. 13), appellant seeks to limit consideration of Ollestad's testimony to three or four passages taken out of context, alleging that "Ollestad's book is irrelevant and immaterial to the issue". Quite to the contrary, the fact that Ollestad took great liberties with the facts, and that he included, as quotations attributed to agents, statements that he admitted were never made [R. T. 169, 172, 199-200] bears directly on the issue of what consideration should be given to his accounts of social conversations with agents. In short, if any

misconduct can be attributed to Norman T. Ollestad, it is his irresponsibility in leveling the serious charge of perjury at another, without making any serious effort himself to ascertain the truth.

C. THE COURT BELOW DID NOT COMMIT REVERSIBLE ERROR IN CONSIDERING THE AFFIDAVIT OF THOMAS R. SHERIDAN.

Appellant, in urging that Norman T. Ollestad was "part of the prosecutive team intimately knowledgeable as to the circumstances of the case against Appellant," (Appellant's Opening Brief, p. 27), stresses the involvement of Ollestad in declining prosecution of the man from whom appellant solicited a bribe. In order to determine exactly when Ollestad did become involved in the Tallmadge case, the court below requested the Assistant United States Attorney to review the file from the Federal Records Center and submit an affidavit as to what the file reflected [R. T. 287-89]. As the Federal Records Center file did not bear a notation showing the date of assignment, it was reviewed by Thomas R. Sheridan, who was Chief of the Criminal Division of the United States Attorney's Office at the time, and whose duties would have included assignment of all criminal cases. Mr. Sheridan signed an affidavit stating that he assigned the file to Mr. Ollestad after receipt of a letter contained in the file, dated February 26, 1963 [C. T. 62].

Appellant's reliance on the "best evidence" rule is misplaced.

Certainly, the sworn testimony of a witness as to when an assignment was made is better evidence than a mere entry on a file to reflect such an assignment. The entry, if made, would have been offered to prove the assignment; instead the assignment was proven by direct evidence. McCormick, Evidence §281 (1954).

In any event, as noted by the court below [R. T. 265], the relevance of when the case was assigned to Ollestad is certainly questionable, in light of Ollestad's testimony that he did not even remember having handled the Tallmadge case [R. T. 230], and his statement that he had no specific recollection that because of the Tallmadge case he knew anything about the Byrnes case [R. T. 132].

In urging Ollestad's connection with his case, appellant has presented, as an appendix to his brief, a certified copy of minutes of the court purporting to show that Norman T. Ollestad appeared for the government at his arraignment. This document was at no time presented to the court below, or even called to its attention. Thus, it is not properly a part of the record on appeal. Rule 75(a), Federal Rules of Civil Procedure; Dictograph Products Co. v. Sonotone Corp., 231 F. 2d 867 (2nd Cir. 1956). However, even if Ollestad were present at the time of appellant's arraignment, such presence certainly would not render him "part of the prosecutive team intimately knowledgeable as to the circumstances of the case against Appellant." In the Central District of California, as in the then Southern District, one Assistant United States Attorney is assigned to handle the complete arraignment calendar, frequently comprising as many as 50 arraignments in one day.

VI

CONCLUSION

In the event this Court concludes that the issues presented are not moot, a review of the record reveals the court below did not err in concluding that appellant could not make a showing that would justify the granting of a Writ of Error Coram Nobis. Therefore, the appellee respectfully prays that the judgment of the court below be affirmed.

Respectfully submitted,

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Attorneys for Appellee,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen

GERALD F. UELMEN